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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-539

CHRISTOPHER J. AQUILA, WILLIAM G. AYLWARD, CARL A. DODARO, JR., DIANNE F. DODARO, JOSEPHINE A. HOWELL, EILEEN PLUMER and BRUNO VITLONE,

Petitioners

vs.

HAROLD E. BRICHFORD, RALPH PETTIFER, CECIL R. LUTZ, HUGH D. PALLISTER, DONALD M. PARK, WILLIAM G. RYAN, JOHN TIGUE, SR., THE CITY OF WILLOUGHBY, A Municipal Corporation, and T.E.K. & ASSOCIATES, A Partnership,

Respondents

REPLY BRIEF OF PETITIONERS

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January 7, 1976

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ARGUMENT

I. STANDING

For the first time in this litigation the respondents' Answer Brief challenges the petitioners' standing to bring the action. Respondents rest their claim on Warth v. Seldin, ____U.S.____, 95 S Ct 2197, 45 L Ed 2d 343, 1975. They rest upon the proposition of Warth that when the harm asserted by a plaintiff is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. ____U.S.____, 95 S Ct at 2205, 45 L Ed 2d at 355.

But here the petitioners are citizens, electors, and taxpayers who specifically undertook to oppose by exercise of their rights of speech and petition the re-zoning that the respondents put into effect by consent decree, a means of legislation that violated the Willoughby City Charter and Ordinances and deprived the petitioners of their rights of hearing and their conditional rights of referendum.

When the re-zoning was first attempted by ordinance the petitioners circulated a referendum petition to bring it to a vote of the people. When their referendum petition was rejected by the city finance director the petitioners sued in Common Pleas Court to enforce their right of referendum, or, alternatively, to invalidate the ordinance on the ground that it had not been passed within 60 days after the Council's hearing of it. They prevailed on the alternative ground, and the referendum issue was mooted. But then, instead of enacting the ordinance by correct procedure, which would have given the petitioners their opportunity to participate in public hearings and their conditional right of referendum, the respondents pur-

portedly adopted by consent decree the very zoning that the plaintiffs opposed, but the consent decree gave no opportunity for the petitioners to participate in public hearings.

The plaintiffs had specific ideas and reasons for opposing the re-zoning.

Paragraph 6 of their Complaint is as follows:

> 6. Among the reasons for each of which one or more of the plaintiffs sought to exercise their right of referendum were a belief that dense residential construction adjacent to the airport would produce an unsafe, unsound, and unstable residential community; a belief that such density of residential construction would not be in keeping with the standards and character of the rest of the community and would be conducive of high levels of air and noise pollution, a low proportion of vegetation to help overcome air pollution, high traffic densities and consequent noise and air pollution therefrom, and overcrowding of the population and consequent high levels of interpersonal tension and crime; a belief that such a large increase of population as would result from the proposed development would cause increased loading of the facilities for supply of water, sewage disposal, garbage and trash disposal, and access of traffic and either impair the services or burden the plaintiffs and other citizens and taxpayers with additional costs, or both; a belief that the increase in population would cause a need for expansion of school facilities with increased costs to the school district at large; and a belief

that such an increase in the population would so change the character of the community that it should not be undertaken without an opportunity for the people to vote their approval or disapproval thereof.

Paragraph 10 of the Complaint (A 8) is as follows:

> 10. Article VI Sec. 3 of the Charter of the City of Willoughby says in part as follows:
>
> > The Council shall by ordinances adopt a comprehensive general plan for the orderly development of the city and plans for the re-development of areas or districts therein. . . .
>
> The defendant Mayor and Councilmen knew that the S-5 zoning of the T.E.K. land would probably be held constitutionally invalid. Nevertheless they failed to enact by the means provided by the Charter and ordinances of the City of Willoughby and the laws of the State of Ohio any new and probably valid zoning for the said land. Such means would have included an opportunity for the plaintiffs to present their views and the knowledge and views of experts in hearings before the Planning Commission and the Council and an opportunity if they wished to take any new zoning that might be enacted (unless enacted by emergency procedures) to the people by referendum.

Thus the petitioners specifically sought and still seek to exercise the rights of speech and petition of which the defendants' illegal action

deprived them. They are like the plaintiffs in U.S. v. SCRAP, 412 U.S. 69, 93 S Ct 2405, 37 L Ed 2d 254, 1973, who were held to have standing because they used the forests, rivers, streams, mountains, and air that they sought to protect by their action and paid increased taxes because of the costs of disposing of otherwise reusable waste materials. Petitioners here are like the plaintiff in Steffel v. Thompson, 415 U.S. 452, 94 S Ct 1209, 39 L Ed 2d 505, 1974, who was held to have standing to sue because he had specifically engaged in protest hand-billing in a shopping center and had been forced to desist by police threats to arrest him for violation of the Georgia criminal statute if he did not desist.

Petitioners here have an interest far more direct, specific, and personal than the generalized interest of all or most citizens of the community in having the laws and ordinances obeyed, as in having the city's zoning laws enacted by ordinance instead of by court decree. Warth v. Seldin, supra, is certainly distinguishable. So are the cases it cites for the proposition that respondents rely on, Schlesinger v. Reservists' Committee to Stop the War, 418 U.S. 208, 94 S Ct 2925, 41 L Ed 2d 706, 1974; U.S. v. Richardson, 418 U.S. 166, 94 S Ct 2940, 41 L Ed 2d 678, 1974; and Ex parte Levitt, 302 U.S. 633, 58 S Ct 1, 82 L Ed 493, 1937.

II. THE S-5 ZONING

The respondents' discussion of the S-5 zoning on page 8 of their brief is, to coin a paradox, a transparent obfuscation.

The petitioners' goal has never been to retain the S-5 zoning, but to prevent the creation of a dense residential zone next to the airport,

which is what the respondents were attempting to do by their invalid ordinance of 1972 and, as petitioners claim, their even more invalid consent decree of 1973.

Petitioners have sued twice because they want a fair opportunity to prevent a particular pattern of zoning toward which the respondents are bent; because if the respondents' will is to prevail over that of the petitioners, the respondents' victory should be at least fair and square, not by a procedurally invalid ordinance, not by what petitioners thought was a trumped up claim of invalidity of the petitioners' referendum petition (this claim now being moot), and not by re-zoning enacted by consent decree instead of by ordinance with fair and square opportunities for the two hearings and the conditional right of referendum. As for the Council's failure to correct the S-5 zoning before the trial even though its members expected it would be held invalid, this seems to petitioners to have been simply a means to avoid the fair and square and lawful ordinance procedure and use instead the illegal consent decree with an appearance of justification for it through the "emergency" manufactured by the Council's failure to act promptly on a lawful ordinance.

It is true that petitioners could have taken action by way of initiative petition. However, it was not their responsibility to enact valid zoning but the Council's. And if they had attempted to re-zone the land by initiative petition in a manner different from that desired by the respondents, their efforts very likely would have been defeated even if the people voted in favor of the initiative measure by action of the land owners establishing a prior use inconsistent with the initiative measure but pursuant to the zoning adopted by the respondents. The initiative did not and does not seem to be an appropriate remedy for the petitioners to have used.

Nor did it seem appropriate for the petitioners to intervene in the state case, T.E.K. v. Willoughby. The petitioners had no particular interest in the validity or the invalidity of the S-5 zoning. They did not anticipate and it does not seem reasonable to suggest that they should have anticipated that that lawsuit would be terminated by a decree affirmatively adopting a new pattern of zoning, since the city charter required re-zoning to be done by ordinance. After the decree was entered the petitioners could have attempted to intervene in the state case to attack the decree, but, especially at that date, it seemed preferable to attack the decree in the federal courts where it was assumed that plaintiffs would be better assured of fair consideration of their First Amendment rights.

III. ELLIS v. DYSON

We do not understand how Ellis v. Dyson, ____ U.S.____,95 S Ct 1591, 44 L Ed 274, 1975, is thought to be helpful to the respondents. If anything, it seems to lend further support to the right of the petitioners to pursue their claim in the federal courts. They were not parties to the state case, T.E.K. v. Willoughby, and so had no obligation to pursue their rights there according to Younger v. Harris, 401 U.S. 37, 91 S Ct 746, 27 L Ed 2d 669, 1971, or Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S Ct 1200,43 L Ed 2d 482, 1975. And there seems to be no basis for suspicion that petitioners' claims in this case are now moot. For whatever reasons, the land owner has not yet obtained a building permit and, we understand, has not taken any action that would constitute a prior use inconsistent with any new zoning that might be validly adopted in the future.

If the respondents' brief intends to say only that if petitioners had no standing in federal

court they could get no remedy except in state court, that of course is a truism we do not contest.

IV. THE CLAIM OF NO EVIDENCE

On page 10 the respondents' brief asserts, "... no evidence was attempted to be introduced by petitioners to support claims of conspiracy or violations of Civil Rights."

This seems less than candid.

The evidence was introduced by stipulation.

It included the Charter, Ordinances, Council resolution, and consent decree. It included the respondents' admissions of many of the allegations of the complaint. This evidence plainly demonstrates, we submit, the violation of the petitioners' civil rights.

The stipulated evidence included the fact that the landowner bought the land while it was still zoned S-5. Complaint, ¶ 3, A6; Answer of defendants other than T.E.K., A15; Stipulations A19. It is not a far fetched inference that the landowner before paying $1,975,000 (A-41) borrowed at high interest (A-42) would have obtained satisfactory assurances from the City that the desired re-zoning would be accomplished.

The stipulated evidence included the fact that the City's finance director (appointed by the Mayor with the confirmation of Council - Joint Ex. 1, Art. V, Sec. 1, Record) declared invalid the referendum petition of 782 purported signatures although 527 were required. Complaint, ¶5, A-7; Answer of defendants other than T.E.K., A-15; Stipulation, A-21.

The stipulated evidence included the fact that the members of Council believed the S-5 zoning would be held invalid, the fact that there was ample time in which to enact new zoning in the prescribed manner before the trial of T.E.K. v. Willoughby and the fact that they did not enact new zoning when they could, although they previously had done so (more than 60 days after the Council hearing) and did so again by entering the consent decree. The only substantial difference we can see between the circumstances of 1972 when the Council enacted the new zoning by ordinances and those of 1973 when it did not is that by 1973 the Councilmen knew that petitioners opposed the new zoning, would oppose it in the hearings, and would oppose it by referendum petition unless it was passed by emergency procedures. These facts, we believe, are evidence of motivation and conspiracy to deprive petitioners of the hearings and referendum.

V. PRESUMPTION OF VALIDITY OF JUDGMENTS

On pages 11 and 12 of the respondents' brief it quotes from 46 Am. Jur. 2d 332 a statement that a judgment is presumed to be valid.

But the force of the quotation as it might be applied here in support of the respondents is utterly avoided by its last sentence:

> "However, a presumption in favor of the validity of a judgment will not be indulged where it is in violation of an express statutory requirement."

The judgment in question here, the consent decree in the Common Pleas Court, is clearly in violation of the express requirement of the Willoughby

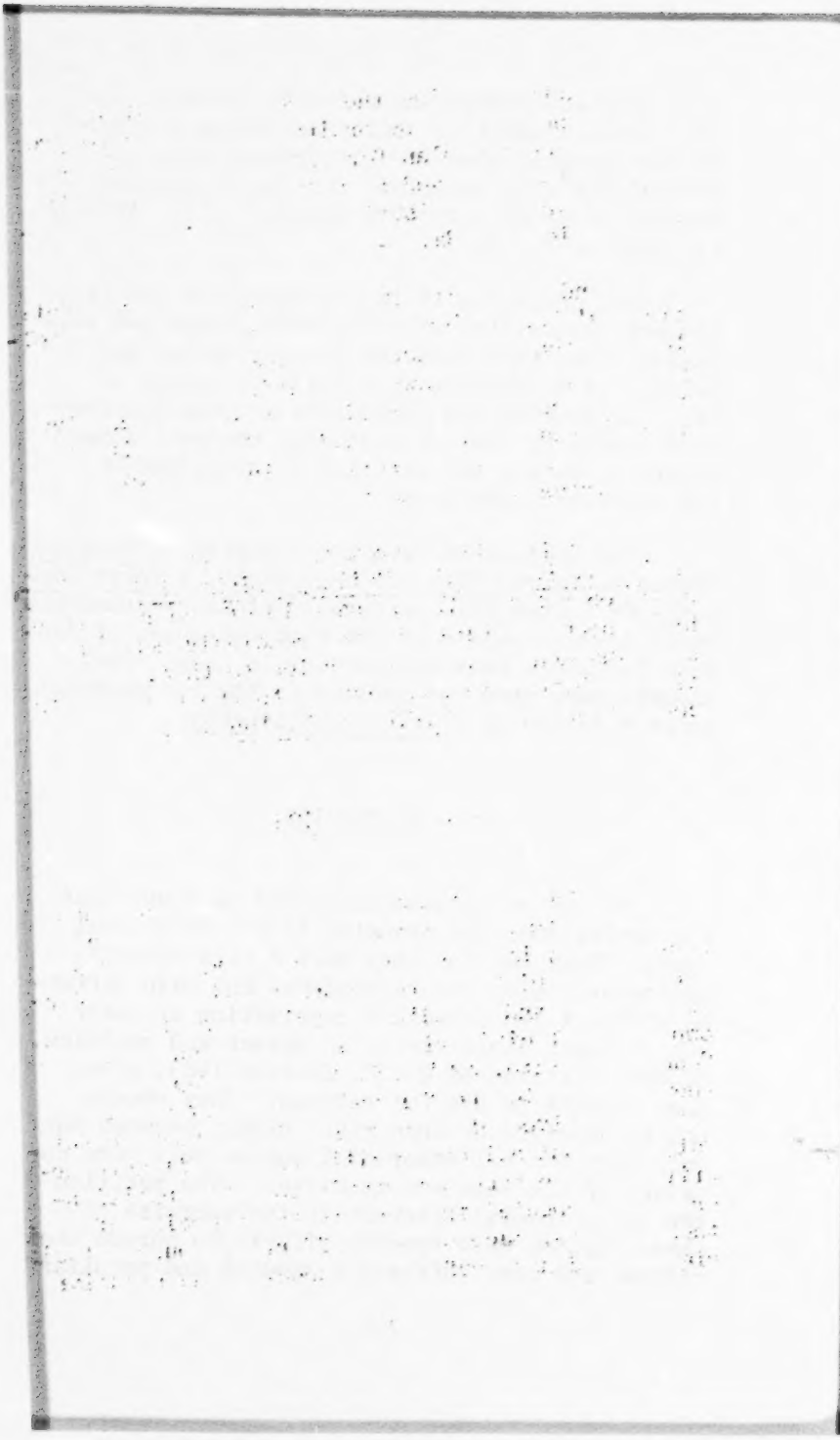
City Charter, having the force of statute, that "The Council shall by ordinances adopt a comprehensive general plan for the orderly development of the city and plans for the re-development of areas or districts therein ...." Article VI, Section 3, 13a.

And of course it is not merely on the petitioners' "suspicion of conspiracy, fraud and collusion" that they want the consent decree set aside. It is because of a plain violation of the city charter and ordinances and the deprivation caused by that violation of the petitioners' rights of speech and petition in violation of the Fourteenth Amendment.

The quotations from the syllabus of Brigida Urbino v. Puerto Rico Railway, Light, & Power Company, 68 F Supp 841, on page 13 of the respondents' brief seem to relate to the conclusiveness of consent judgments over the parties to them. Petitioners here were not parties to the respondents' consent decree in T.E.K. v. Willoughby.

VI. CONCLUSION

We see no reasonable ground to doubt that the petitioners had standing to sue in federal court. They had and they have a live specific controversy with the respondents and have suffered a direct and immediate deprivation of their own personal civil rights of speech and petition. Federal statute, 42 U.S.C. Section 1983, gives then a right to sue for redress. They should not be deprived of this right simply because not only they but all other citizens as well were deprived of the same opportunities. The petitioners had a special interest in the exercise of these rights, made special efforts to pursue their rights, and have suffered a special and peculiar



loss, especially if it is accepted, as petitioners believe, that at least part of the motivation for the respondents to have adopted the consent procedure instead of lawfully enacting an ordinance was to circumvent the petitioners' rights of speech and petition.

The district court utterly misconstrued the effect of the statutory and charter provisions for emergency legislation in holding that those provisions were a limitation not only on the right of referendum but also on the duty to enact re-zoning by ordinance with hearings before the Planning Commission and Council. In thus over-extending the effect of the emergency clause that the Council adopted with its resolution authorizing the consent decree, the district court erroneously concluded that the procedure the Council followed was lawful and thus did not deprive the plaintiffs of any rights.

The Court of Appeals refused to consider this error on which the District Court's judgment rested, but said the state questions were for the state courts and nevertheless affirmed instead of vacating the District Court's judgment. Thus the Court of Appeals failed to exercise its pendent jurisdiction but instead apparently attempted to abstain from deciding the state questions, yet failed to protect the petitioners' rights to go to the state courts pursuant to federal abstention by failing to vacate the state law decision on which the district court had rested its judgment, which the Court of Appeals affirmed.

We do not understand the position that the respondents have adopted as to what action should be taken by this Court. On the one hand they assert that the petitioners have no standing to sue, and if that were true the judgments of the District and Circuit Courts would have to be vacated. On the other hand the respondents ask this court to affirm the courts below and deny the writ of

certiorari requested by petitioners. Apart from the contradiction between affirmance and denial of certiorari, either of these actions would be contradictory to the idea that the petitioners do not have standing to take their case to the federal courts.

We urge that the petition for certiorari be granted.

Respectfully submitted,

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